22

Office - Supreme Court, U. S.
FILED
MAY 1 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 984

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

HAROLD HADESMAN, Alias Harold Goldstein

No.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

COBB, HOWARD & HAYES
By: JAMES A. COBB,
Attorney for Petitioner.

W. G. ANDERSON,
Of Counsel.

Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

SUBJECT INDEX

	PAGE
Petition	1
Summary Statement	2
The Trial and Sentence	2
Proceedings Had in the Supreme Court of Michigan	5
Jurisdiction	6
Questions Presented	7
Reasons Relied Upon for Allowance of Writ	7
Argument	7
The Ownership of Property Is a Material Allegation of an Indictment and, Accordingly to the Weight of Authority, the Name of the Person Whose Property Is Destroyed or Injured Must Be Stated in an Indictment or an Information, and Must Be Strictly Proven as Charged	17
The Statute Under Which the Defendant Was Convicted and the Application Thereof by the Court's Charge Is Unconstitutional	19
The Application of This Statute Is in Violation of the 14th Amendment of the Constitution of the United States Which Had the Effect of Making the 5th and 6th Amendments Applicable to the State	21

TABLE OF CASES

Bridges v. State of California, 314 U. S. 252, 86 Law Ed. 314	24
Carter v. Texas, 177 U. S. 44, Law Ed. 839	24
Cooksey v. State (Miss.) 166 So. 389	18
Cumberland Glass Manufacturing Co. v. DeWitt (Md. 1915) 237 U. S. 447, 35 S. Ct. 636, 59 L. Ed. 1042	21
Dred Scott v. Sanford, 19 Howard 393, 15 Law Ed. 691	23
Ex Parte Virginia, 100 U. S. 339, 25 Law Ed. 677	24
Findley v. State (Fla.) 168 So. 544	18
Halinger v. Davis, 146 U. S. 314	22
Hurtado v. California, 110 U. S. 516, 28 Law Ed. 233	22
Jetton v. State (Ala.) 195 So. 283	18
Johnson v. Zerbst, 304 U. S. 458	6

PAGE
Johnston v. Zerbst, 304 U. S. 458, 82 Law Ed. 1461 21
Lanzetta et al. v. New Jersey, 306 U. S. Rep. 451, 452 14
Lanzetta v. New Jersey, 306 U. S. Rep. 451 6
Maxwell v. Dow, 176 U. S. 581, 44 Law Ed. 597 22
Near v. Minnesota, 283 U. S. 697, 75 Law Ed. 283 24
Noojin v. State (Ala.) 194 So. 414 17
Norris v. Alabama, 294 U. S. 587, 79 Law Ed. 1074 23
People v. Cabassa, 249 Mich. 543 13
People v. Goldberg, 248 Mich. 553 13
People v. Kolodzieski, 237 Mich. 654 13
People v. Pernalsky et al. (Ill.) 165 N. E. 190 19
Powell v. Alabama, 287 U. S. 45 6
Potter v. State (Fla.) 109 So. 91 18
Schneider et al. v. State (Town of Irvington No. 11) et al., 308 U. S. 147, 84 Law Ed. 146 24
Slaughter House Cases, 16 Wallace 36, 21 Law Ed. 394 22
Smith v. State (Fla.) 117 So. 377 18
State v. Lapointe, 81 N. H. 227, 123 A. 692, 696, 31 A. L. R. 1212 15
State v. Schultz (Mo.) 295 S. W. 535 18
Strauder v. W. Virginia, 100 U. S. 303, 25 Law Ed. 644 24
The People v. Csontos, 275 Ill. 406 17
Toledo Newspaper Co. v. United States 247, 62 Law Ed. 1186 23
Twining v. New Jersey, 211 U. S. 97, 53 Law Ed. 77 22

STATUTE CITED

Act No. 254, Pub. Acts 1939 (Stat. Ann. 1942 Cum Supp. Parg. 25.588) 5

AUTHORITY CITED

Bashfield Cyclopedia of Automobile Law and Practice, Section 5570 17

Supreme Court of the United States

OCTOBER TERM, 1942

No.....

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

HAROLD HADESMAN, Alias Harold Goldstein

No.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, AND BRIEF IN SUPPORT THEREOF

PETITION

Petitioner, HAROLD HADESMAN, alias Harold Goldstein, the above named defendant, a resident of the County of Cook and State of Illinois, was convicted in Paw Paw, Michigan under an information based on a violation of Act 194, Public Acts of 1937, as amended by Act 294 of 1939, M. S. A. 28.588 (1); petitioner was tried in the Circuit Court of Wayne County, Michigan, before the Honorable Glenn E. Warner, Circuit Judge of the 36th Judicial Circuit of the State of Michigan; that he was convicted by a jury and sentenced to serve a term of imprisonment of not less than fourteen months nor more than five years in the state penitentiary at Jackson, Michigan.

That thereafter an application for stay was made, and granted on the 27th day of March A.D., 1943 by the Honorable Stanley Reed, Associate Justice of the Supreme Court of the United States.

SUMMARY STATEMENT

It is the contention of petitioner that first, the Michigan Statute under which he was convicted, conflicts with the Fourteenth Amendment of the Constitution of the United States of America; and secondly, that the trial before the Circuit Court of Wayne County, Michigan, lacked due process of law as guaranteed to him by the Constitution of the United States of America and by the Constitution of the State of Michigan.

THE TRIAL AND SENTENCE

A complaint, and examination on oath and in writing was had before Roy S. McCrimmon, a Justice of the Peace of the City of South Haven, Wayne County, Michigan, on the 21st day of July A.D., 1941, at the instance of Floyd Whetham, to which complaint petitioner pleaded not guilty; and thereafter the cause was removed to the Circuit Court of Van Buren County, Michigan, and information duly filed, the petitioner was arrainged and stood mute (Rec. 24).

Following petitioner's arraignment, motion to quash the information, based on the insufficiency of the evidence produced at the preliminary examination, was made and denied (Rec. 24) and petitioner was placed on trial. The jury returned a verdict of "guilty" (Rec. 72).

During the submission of the People's proofs, the People offered in evidence the Illinois Revised Statutes requiring registration of motor vehicles, and a certified copy of the Certificate of Registration of the motor vehicle alleged to have been entered (Rec. 39, 40, 47). The trial court ruled that proof of ownership was not essential to the establishment of the offense, and excluded the testimony (Rec. 49, 50). There was no other proof of ownership of the motor vehicle. At the conclusion of the People's proofs, motion for a directed verdict was made, assigning as the principal ground the failure of the People to prove the ownership of

the motor vehicle alleged to have been entered (Rec. 53). This motion was denied (Rec. 54).

After the verdict of the jury had been returned, a motion in arrest of judgment (Rec. 73), and a motion for a new trial (Rec. 75), was filed. These motions renewed the objection that the ownership of the vehicle had not been established, and also included alleged misconduct between two jurors and a prosecuting witness, who were alleged to have taken lunch together during the deliberations of the jury (Rec. 90). These motions, likewise, were denied by the trial court (Rec. 89).

On the afternoon of July 20th, 1941, Deputy Sheriff Floyd Whetham, from a position on a bluff approximately at fifty feet away (Rec. 31) claimed he saw a man whom he identified as petitioner (Rec. 29), break into an automobile (Rec. 32), which he identified solely by the license number 690-790. The claimed entry was effected by placing an instrument between the ventilator window and the door frame of the car, and pushing down on the instrument, thereby raising the ventilator window (Rec. 31). At the time he heard glass break (Rec. 32). He described the individual as being dressed in a bath robe which was closed (Rec. 31), and which was of some dark color (Rec. 37). Nothing was taken from the car, although there were articles of value therein (Rec. 59).

Whetham testified he had previously seen this car, occupied by four people (Rec. 29) driven into a parking lot by a man whom he identified as Frank Steinberg (Rec. 30). The occupants of the car prepared for bathing, locked the car and left, after which the claimed entry was effected (Rec. 30). There is no other identification of the driver of the car.

After the so-called entry, a man identified as Harry Goldstein (Rec. 51), appeared with four other unidentified individuals, produced the keys and unlocked a car, which bore Illinois license 690-*792* (Rec. 51). The testimony of Robert Murray (Rec. 43), Fred Ennis (Rec. 51), and the photo-

graphs and evidence of Richard Appleyard (Rec. 39) all refer to this car bearing license 690-*792*.

Whetham testified that petitioner sat in a motor vehicle on the parking lot (Rec. 29) at the time the entered car was parked on the lot; that the car entered was parked next to the car in which petitioner sat (Rec. 29); that shortly thereafter petitioner left the parking lot (Rec. 30), and returned (Rec. 31), after which he effected the entry (Rec. 31). Robert Murray, a detective with the Michigan State Police, testified that he took a position at the front of the parking lot (Rec. 41), and saw a man whom he identified as petitioner leave the parking lot, go to a cottage, and then return to the parking lot (Rec. 41), and described the individual as wearing an old tan bathrobe, which was not closed or fastened in any way (Rec. 46). Neither Murray nor Whetham were acquainted with petitioner, and the only time either had seen petitioner previous to the time of the alleged offense was during a half hour period immediately preceding the alleged offense, when Whetham and Murray testified they followed petitioner and another individual, in an automobile (Rec. 34, 40).

Whetham testified that after the offense petitioner sat on a sand bank within twenty-five feet of Whetham, then crossed the parking lot to the west (Rec. 38), and went to the beach. Petitioner was not arrested until about *three o'clock* in the morning of July 21st (Rec. 52).

Petitioner claims an alibi. He testified that at the time of the alleged offense he was on the beach (Rec. 54), and not on the parking lot, and his testimony was supported by the testimony of four other witnesses.

The verdict of the jury was returned on the 30th day of October, 1941, and on motion of counsel for petitioner, made in open court, proceedings were stayed for a period of twenty days.

Petitioner was sentenced on January 9, 1942 to serve a term of imprisonment in the state penitentiary at Jackson,

Michigan, of not less than fourteen months nor more than five years.

PROCEEDINGS HAD IN THE SUPREME COURT OF MICHIGAN

The petitioner, having been duly convicted and sentenced to imprisonment in the state penitentiary at Jackson, Michigan, thereupon sued out a Writ of Error to the Supreme Court of Michigan to review said judgment and said sentence; and upon due consideration of said cause by said Supreme Court, the judgment and sentence rendered against petitioner were duly affirmed. The order of affirmance of said Supreme Court of Michigan is as follows:

> Act No. 254, Pub. Acts 1939 (Stat. Ann. 1942 Cum Supp. Parg. 25.588), makes it a felony to "break or enter into any motor vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property regardless of the value thereof if in so doing such person breaks, tears, cuts or otherwise damages any part of such motor vehicle." Under an information charging such offense defendant was found guilty by a jury and he prosecutes review.
>
> At the preliminary examination defendant claimed the evidence was insufficient to hold him for trial. We find sufficient evidence justifying the examining magistrate in binding him over for trial in the circuit court. The information alleged the motor vehicle in question was a 1939, four-door Plymouth sedan, owned by Frank Steinberg. Mr. (fol. 101) Steinberg lived in Illinois and was endorsed on the information as a witness for the prosecution to establish the ownership of the automobile. Under the mentioned statute it was not necessary for the prosecution to establish the ownership of the automobile but sufficient if it was the property of some one other than the defendant, and this fact was clearly established. There was sufficient competent evidence from which the jury could find defendant guilty beyond a reasonable doubt. The verdict was not against the great weight of the evidence; defendant's motions to dismiss, to quash the information and for

a directed verdict were properly denied, as well as his motion in arrest of judgment and for a new trial.

The Steinberg automobile was parked at the bathing beach at South Haven and the evidence established the fact that defendant went to the automobile and with some instrument forced one of the ventilator windows open. In doing so he broke the glass and then reached in and lowered the window, entered his head and shoulders and felt around with his hands. Defendant gave notice of alibi, claiming he was bathing at the beach and had come there from Chicago in another automobile, accompanied by friend.

The conviction is affirmed.

Signed: Howard Wiest, Walter H. North, Emerson R. Boyles, B. D. Chandler, Raymond W. Starr, Henry M. Butzel, Edward M. Sharpe, George E. Bushne.

Endorsed: Filed Feb. 23, 1943. Jay Mertz, Clerk, Supreme Court.

JURISDICTION

Jurisdiction of the United States Supreme Court to Review the Judgment of the Supreme Court of Michigan.

This court has jurisdiction to review this cause, because a Federal Constitutional question is distinctly raised upon the face of the record, and definitely ruled on by the highest court of the State of Michigan adversely to the contention of the petitioner who presented the issue.

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA;

Lanzetta v. New Jersey, 306 U.S.Rep. 451;
Johnson v. Zerbst, 304 U.S. 458;
Powell v. Alabama, 287 U.S. 45.

QUESTIONS PRESENTED

The questions presented upon the record are:

Whether petitioner has been deprived of his liberty without due process of law under the Federal Constitution, amendments Five, Six and Fourteen, in that, under Act 194, Public Acts 1937, as amended by Act 294 of 1939, M.S.A. 28.588 (1), and under Sec. 28.994 M.S.A. proof of ownership of property by the complaining witness is not required to be proven as the constituent element of due process of law in order to prevent a subsequent conviction in the State of Michigan for the same offense.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The Supreme Court of Michigan, in People v. Cabassa, 249 Mich. 543 (p. 547) and in Durand v. People, 47 Mich. 332, has held that the statute in question, allowing a conviction without actual proof of ownership, constitutional.

ARGUMENT

1. Is ownership of the vehicle entered an essential element of the offense charged? In denying the motion of petitioner's counsel for a new trial, the learned Judge rendered the following opinion:

> "The information reads: 'That Harold Hadesman * * * on the 20th day of July, 1941, at the city of South Haven, in the county of Van Buren, aforesaid, did break and enter a certain motor vehicle, to-wit, a 1939 four-door Plymouth sedan, owned by Frank Steinberg, for the purpose of stealing or unlawfully removing therefrom goods, chattels, or property, and in so doing did break and damage the right front ventilator window of said Plymouth sedan.' The statute under which defendant was prosecuted (Act 194, Public Acts 1937, as amended by Act 254 of Public Acts of 1939, M.S.A., Sec. 28.588 (1)), as far as material provides: 'Any person who shall enter or break into any motor

vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property of the value of not less than five dollars, or who shall break and enter into any motor vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property regardless of the value thereof, if in so doing such person breaks, tears, cuts, or otherwise damages any part of such motor vehicle, shall be guilty of a felony * * *.'

"The defendant was convicted by a jury. He has moved for a new trial, assigning thirteen reasons and, in arrest of judgment, set out eleven reasons such motion should be granted. The motions were consolidated and argued together. Counsel for respondent, in his brief, has condensed these reasons into four groups and that order will be followed in deciding the motions.

"I.

"The motion for new trial is supported by the affidavit of Glenn Gilliland, a resident of the city of Oak Park, Illinois, in which he swears, 'That on the 28th day of October, 1941, he went to a restaurant in the village of Paw Paw for lunch, between the hours of 12:00 and 1:30 p.m. and while in said restaurant he observed two persons, who were identified as jurors duly impaneled, in the case of People v. Harold Hadesman; that in the same booth, at the same time, was a person identified as Robert Murray, a member of the Michigan State Police, and that while said jurors and the said Robert Murray were together, he heard the name of Hadesman mentioned.'

"The counter-affidavit of Robert Murray has been filed, in which he denies the statements contained in the affidavit of Gilliland.

"The court suggested Messrs. Gilliland and Murray be examined in open court on hearing of the motion but counsel preferred to submit this question on affidavits. The affidavits of Mr. Gilliland is not corroborated; in it he does not state the names of the jurors or does not allege by whom Robert Murray was identified. The showing is not sufficient to justify the granting of the motion.

"II.

"The names of the witnesses Frank Steinberg, Mrs. Frank Steinberg, Harry Goldstein and Mrs. Harry Goldstein were endorsed on the information and called in court, but did not respond. These witnesses are residents of Illinois; subpoenas were issued; service was obtained on Mrs. Harry Goldstein in Chicago, but the officers were unable to find the other three in Michigan or Illinois. A diligent and good faith effort was made to produce them. Because the People were not able to induce or cause these witnesses to return to Michigan is not sufficient reason to grant the motions.

"III.

"It is next claimed there was not sufficient evidence from which a jury could find guilt beyond a reasonable doubt. The transcript has been read. No useful purpose would be served in setting out the testimony. It is sufficient to say that the proofs fully supported the verdict.

"IV.

"Respondent urges ownership is an essential element of the offense and that the conviction cannot be sustained because there was no proof of ownership. Such proof was not presented at the examination and, for this reason, a motion to dismiss was made soon after the return of the justice of the peace was filed in this court. The motion was denied. After arraignment, motion was made to quash the information for the same reason, and this motion was also denied. On the trial the prosecuting attorney sought to introduce the Revised Statutes of Illinois, and particularly page 2105, Chapter 95½, Sec. 8, requiring owners of motor vehicles to file registration and obtain certificates of title and also offered certified copy of certificate of ownership. Counsel for defendant objected on the ground to allow the introduction of certified copy of certificate of title would deny defendant the right 'to be confronted with the witnesses against him', in violation of Article 2, Sec. 19 of the Constitution of 1908,

and 3 Comp. Laws 1929, Sec. 17129 (M.S.A. 28.854). If this objection was well taken it would follow that the motion to dismiss should have been granted because title or ownership of the car was not proved in justice court. In view of the ruling of the court, which will presently be quoted, the question of the admissibility of the certified copy of title is not material. However, see Sections 27.867, 27.874 and 27.961 M.S.A.; People v. Jones, 24 Mich. 225; Mitchell v. Reolds Farm Company, 268 Mich. 301; 14 Am. Jr., pages 894-895, Sec. 185.

"In disposing of the objections, and in the absence of the jury, the court said: 'This prosecution is based on Act 194, Public Acts 1937, as amended by Act 294 of 1939, M.S.A. 28.588 (1).

" 'That act makes it a felony to commit larceny by stealing or unlawfully removing or taking certain enumerated attachments from any motor vehicle. The violation of that portion is not counted on in the information.

" 'The statute further makes it an offense "to enter or break any motor vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels, or property of the value of not less than five dollars, or to break or enter any motor vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property, regardless of the value thereof, if in so doing such person breaks, tears, cuts, or otherwise damages any part of such motor vehicles."

" 'Under the information the crime has three elements:

" '1. Entering or breaking into any motor vehicle.

" '2. For the purpose of stealing or unlawfully removing therefrom goods, chattels, or property, regardless of the value.

" '3. In so doing breaks or damages any part of the vehicle.

" ' "Michigan" is called the vacation land or the summer playground. Public and private funds are used to advertise the beauties and advantages of its

streams, lakes and beaches. People from nearly every state in the Union come to Michigan. The tourist is second, if not the largest, business in this Commonwealth.

" 'The statute makes one element of the offense the entering or breaking of any motor. Proof of ownership of the motor vehicle is not an essential element in the crime. To hold otherwise, would mean a prosecution would fail if the vehicle owned by a non-resident of Michigan who would not or could not return voluntarily to this state and testify, because his deposition could not be taken and used in a criminal case and he could not be compelled to come here by subpoena. Such a conclusion would be a reproach to the law.

" 'The jury will be charged that the essential elements are as above stated.'

"Helpful briefs have been filed but cases construing this or similar statutes have not been found. Counsel for respondent has cited authorities from other states holding that in a prosecution for burglary it is necessary to allege and prove the ownership of the building entered or broken. Such decisions are not applicable in Michigan because the rule has been changed by statute (Sec. 28.994, M.S.A.) reading: 'The indictment need not allege the ownership of any property unless such ownership is necessary to indicate the offense. Proof of possession or right of possession or lien or special property in the person alleged to be the owner shall be sufficient to sustain an allegation of ownership in such person.'

"About three o'clock the afternoon of July 20, 1941, Frank Steinberg drove the Plymouth car to a parking lot near the beach at Lake Michigan; with him were Mrs. Steinberg and Mr. and Mrs. Harry Goldstein. They alighted, locked the car and went to the beach to bathe. The People claimed respondent was watching while the occupants disrobed in the car and after they left committed the offense. The defendant was positively identified by the deputy sheriff. Sergeant Fred Ennis, of the Michigan State Police, testified that soon after it is charged the offense was committed, he went to the Plymouth 1939 sedan, with license No. 690792, Illinois 1941, waited five or ten minutes when Mr. Harry Goldstein returned from the beach

with the keys in his hand and opened the car, and directly behind him were a man, two women and a child. They entered the car and followed him to the South Haven police post, where the automobile and the broken parts were examined and photographs of the car taken.

"In a prosecution for robbery or larceny, as against a wrongdoer, an actual possession or custody of the stolen property is sufficient proof of ownership. Durand v. People, 47 Mich. 332; People v. Cabassa, 249 Mich. 543 (547), 17 R.C.L., p. 67. As arson of a house is an offense against the habitation and not against the owner of the fee and regards possession rather than title, so the offense charged in this information is an offense against the automobile and not against the title. See generally People v. John Doe, 264 Mich. 475 (481), as to the elements of the statutory offense therein charged.

"Defendant did not claim he owned the car or had the right of possession. It was identified by make, color, model, year and license number. Photographs of the automobile were taken and introduced in evidence, without objection.

"Mr. Steinberg had the possession and custody of the car. His right thereto was not disputed. Proof of ownership is not an essential element of the offense. Proof of possession is sufficient and in any event would sustain an allegation of ownership.

"The defendant gave notice of an alibi and his counsel, in the opening statement to the jury, said: 'These officers are guilty of a mistake of identity.' And further, it was claimed: 'That he (defendant) was not the person who committed the offense and * * * it is our claim that this is a case of mistaken identity—that the person who did it was not Harold Hadesman, the respondent in this case.'

"The defendant did not dispute the testimony of the plaintiff that the crime had been committed. The jury was instructed fully relative to intent, defense of the alibi, and the elements necessary to be proved by the prosecution. No requests to charge were proposed by counsel for defendant. Complaint is not made about the instructions. It would have been proper and correct to have charged that the offense was established

> and the only question for the jury to pass upon was whether the defendant was the person who committed the crime. People v. Kolodzieski, 237 Mich. 654; People v. Goldberg, 248 Mich. 553; People v. Cabassa, 249 Mich. 543.
>
> "The motions are denied."

It will be noticed that the learned Trial Judge laid great stress upon the beauties of Michigan as being the cause of migration of tourists yearly, and evidently the learned Judge believed that the interests of the State of Michigan of necessity required a conviction; but as the Court of Appeals of New York, in the case of Sharpes et al. v. Thurston, 208 N. Y. 123 (C.C.A.) held:

> "The necessity, whether actual or assumed, can never be a valid ground for depriving any person of a right guaranteed by the Constitution."

We most respectfully submit that the petitioner, a resident of the State of Illinois, temporarily in Michigan, has the constitutional right to envoke the strong arm of this court of the United States—the highest tribunal—to question the legality and the constitutionality of his conviction based upon the statutes here involved. We further submit that this Court has the constitutional right to look into the very truth and substance of the causes of his detention, as so held in the habeas corpus case of Johnson v. Zerbst, 304 U. S. 458, wherein the court, on page 466, speaking through Mr. Justice Black said:

> "There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in

a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him."

In the instant case, we respectfully submit that this particular statute allows a conviction, even if a thief temporarily has possession of a car. The statute is vague and uncertain in its phraseology, and a case in point, decided by this Honorable Court on the vagueness and uncertainty of a recent enactment of the State of New Jersey, opinion delivered by Mr. Justice Butler, in which the court said:

> "If, on its face, the challenged provision is repugnant to the due process clause, special occasion of details of the offense intended to be charged would not serve to validate it."

The court there said:

> "By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, Parg. 4 c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment. It is as follows:
>
> "'Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster * * *
>
> "'Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both.'"
>
> Lanzetta et al. v. New Jersey, 306 U. S. Rep. 451, 452.

The court, in conclusion, said:

> "The lack of certainty of the challenged provision is not limited to the word 'gang', or to its dependent 'gangster'. Without resolving the serious doubts arising from the generality of the language, we assume that the clause 'any person not engaged in any lawful occupation' is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression 'known to be a member'. It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a 'gang'." (P. 458.)

In State v. Lapointe, 81 N. H. 227, 123 A. 692, 696, 31 A.L.R. 1212, this question was evidently presented, for the court stated:

> "It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence should be weighed by the jury and found sufficient to prove the case. It is his right to decline to produce any evidence and to stand solely upon the proposition that the state must prove a case against him. * * *
>
> "The rule of the Constitution is that the defendant in a criminal case cannot be compelled to go forward. 'The fact that he is charged with a crime gives him certain special privileges. Among these are the requirements of the state to prove the charge against

him beyond a reasonable doubt; the constitutional prohibition of compelling him to accuse or furnish evidence against himself; the right to meet the witnesses against him face to face, and so forth'. * * *

"In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with crime.

"Most courts that have sustained these statutes as binding the judgment of the jury have done so upon the theory that all the Legislature had undertaken to do was to prescribe a rule of evidence. As already pointed out, this is not the real purpose and effect of the legislation. It seeks to compel a party to go ahead in the case, to produce evidence, or else have the fact found against him as matter of law. It is a rule of procedure, and undertakes to take from the defendants rights guaranteed to him by the Constitution.

"It is herein that these statutes are fatally defective. By what authority can the Legislature impose a burden upon the defendant for not producing evidence? One will search in vain through all the decisions for the answer. No doubt the statute gives the defendant full opportunity to present all the evidence, but that does not help the situation. These statutes were not designed for and do not apply in, cases where other evidence upon the question is produced. They apply only to cases where there is no evidence save the statutory inference from fact A to fact B, and they say to the jury that the inference is inevitable. You must find fact B if you find that fact A is proved.

"* * * To stress this so-called privilege of the defendant to produce evidence, as so many courts have stressed it, is an entire perversion of the protection guaranteed to him. * * *

"It is his constitutional right not to produce evidence. Were it not for the array of cases denying the substance of this privilege, it would seem incredible that any one could suppose that it could be invaded by any legislation based upon a power to penal-

ize the exercise of the right. Giving to him the right to produce evidence, or not, is no substitute for his right not to produce it. The former is a privilege now generally conferred. But the latter is a fundamental right which neither Legislatures nor courts are at liberty to impair. Conferring the privilege to produce cannot limit or in any way affect the constitutional right not to produce."

The Ownership of Property Is a Material Allegation of an Indictment and, Accordingly to the Weight of Authority, the Name of the Person Whose Property Is Destroyed or Injured Must Be Stated in an Indictment or an Information, and Must Be Strictly Proven as Charged.

Authorities sustaining this well settled proposition of law are the following:

In The People v. Csontos, reported in 275 Ill. 406, the Supreme Court of Illinois held as follows:

> "Larceny is an offense against the owner of property, and the name of the party injured by the larceny must be stated, if known. The owner is so affected by the crime that his name becomes material to a statement of the offense in an indictment, and the ownership, being an essential element, must be proved as alleged. (Willis v. People, L Scam. 399; Aldrich v. People, 225 Ill. 610.)"

In the prosecution for larceny of an automobile, the ownership of the car is a relevant fact.

> Bashfield Cyclopedia of Automobile Law and Practice, Section 5570.
>
> "Not only should an indictment for burglary lay, with precision, the ownership of the burglarized property, but the proof must conform to the averment. The record of the evidence is utterly silent as to the ownership of the property burglarized, except that it was a school house at Ruhamer."
>
> Noojin v. State (Ala.) 194 So. 414.

"The language of the statute is general in its nature, but it is well settled that the ownership of the building must be alleged in the indictment or information, for the purpose of showing on the record that the building alleged to have been broken into was not the property of the accused, and also for the purpose of so identifying the offense as to protect the accused from a second prosecution for the same offense."

Findley v. State (Fla.) 168 So. 544.

"Long ago it was said that one of the essentials of a charge in offenses against property is the negation of defendant's ownership by such averments as to show affirmatively that the property, general or special, against which the crime is laid, is in another. So far as we can ascertain, that is the law today."

Jetton v. State (Ala.) 195 So. 283.

"Ownership of a building broken and entered is a material ingredient of an offense of breaking and entering and an indictment which contains no allegation of ownership of the building is fatally defective."

Potter v. State (Fla.) 109 So. 91.

"An indictment charging burglary must allege the ownership of the building burglarized, and such ownership must be proced as alleged."

Cooksey v. State (Miss.) 166 So. 389.

"The judgment should be reversed because of the variance between the allegation and proof of ownership. Under the statutes denouncing burglarious entry, the allegation of ownership of the building is maaterial and must be proved as laid."

Smith v. State (Fla.) 117 So. 377.

"It is well established in this state that the identity of the person whose rights are so violated must appear in positive form in the accusation as well as in the proof."

State v. Schultz (Mo.) 295 S.W. 535.

"The ownership of the building entered is an essential allegation in charging the offense of burglary. Where an allegation of ownership is necessary in an indict-

ment the ownership must be alleged in a person, corporation or other entity, that may be the owner of property. The averment of corporate ownership in such a case is a material one, and the existence of a corporation must be proved."

People v. Pernalsky et al. (Ill.) 165 N. E. 190.

The Statute Under Which the Defendant Was Convicted and the Application Thereof by the Court's Charge Is Unconstitutional

Let us turn to the statute and the application thereof in this case. That portion of the statute which is material and the Judge's charge thereon, are herewith set out (Act 194, Public Acts 1937, as amended by Act 254 of Public Acts 1939, M.S.A., Sec. 28588 (1)), as far as material, provides:

> "Any person who shall enter or break into any motor vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property of the value of not less than five dollars, or who shall break and enter into any motor vehicle for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property regardless of the value thereof, if in so doing such person breaks, tears, cuts, or otherwise damages any part of such motor vehicle, shall be guilty of a felony * * *"

The charge of the Judge, which was upheld by the Supreme Court of Michigan, applying the statute, is as follows:

> "It is not necessary that you find respondent did break and enter for the purpose of stealing. It is sufficient if the People have proved his purpose or intent was to unlawfully remove personal property from the automobile.
>
> "It is not necessary for the People to produce as witnesses the owners of the car * * *
>
> "The burden rests upon the People to prove that at the time alleged, the respondent did break and enter the motor vehicle for the purpose of stealing or unlawfully removing goods, chattels or property therefrom, and that in so doing did break or otherwise damage a part of such motor vehicle." (Record 69.)

Our contention is that the statute as applied was in derogation of the respondent's constitutional right under the 14th Amendment of the Constitution of the United States, in that it denied him due process of law, and also because it abridged the privileges and immunities of the respondent in derogation of the 5th and 6th Amendments, which had the effect of making the 5th and 6th Amendments applicable to the states, and which reads, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The court's attention is invited to that part of the charge in which it is stated, "It is not necessary that you find respondent did break and enter for the purpose of stealing. It is sufficient if the people have proved his purpose or intent was to unlawfully remove personal property from the automobile." The differentiation and the refinement of the court in drawing the line of demarkation between intent to steal and removing property with an unlawful purpose is such that no jury could comprehend, nor, indeed, does the court itself clearly draw the line of distinction between stealing and unlawful purpose, or so clarify unlawful purpose that it could be understood by a reasonable mind. We are of the opinion that if the statute so says it is in derogation of defendant's rights, and certain it is, as construed by the court, it is unconstitutional because there is no standard by which the jury can measure the defendant's guilt in that it denies him his liberty without due process of law.

Further, in this connection it is expressly submitted that ownership of the vehicle in question is an essential element of the defendant's charge and that the conviction ought not to be upheld in the absence of such proof.

The 5th Amendment of the Constitution of the United States says, among other things, "* * * nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb * * *" That of itself carries with it the identity of the offense so that the former jeopardy might be applied. If there be no identity of the offense, the person might be twice or thrice convicted for the same offense and the plea of former jeopardy or autrefois acquit cannot be applied. Such construction is in the teeth of the 5th Amendment to the Constitution of the United States and if applied by the state in such manner as here applied, it deprives the defendant of his liberty without due process of law and in derogation of the 14th Amendment of the Constitution of the United States. See Johnston v. Zerbst, 304 U. S. 458; 82 Law Ed. 1461.

A plea of former judgment in a federal court adjudicating a right of federal origin, asserts a right which if denied makes a case arising in a state court reviewable by the Supreme Court of the United States. Cumberland Glass Manufacturing Co. v. DeWitt (Md. 1915) 237 U. S. 447, 35 S. Ct. 636, 59 L. Ed. 1042.

The verdict of the jury, as the record will disclose, could not and would not have been arrived at were it not for either the unconstitutionality of the statute as apparent on its face, or the construction thereof as made by the court in its charge. To allow such a verdict to stand would mean that the defendant's rights had been entirely sacrificed and the rights of a fair trial and due process had been entirely denied him. See Record, pp. 69 and 89.

The Application of This Statute Is in Violation of the 14th Amendment of the Constitution of the United States Which Had the Effect of Making the 5th and 6th Amendments Applicable to the State.

It is to be noted that the proceedings had in this cause were, upon complaint, executed by one Roy S. McCrimmon,

Justice of the Peace, who held the defendant for trial by the Circuit Court without further action or indictment, and again we contend, in violation of the defendant's constitutional right the trial was had. The pertinent part of the 5th Amendment is as follows: "No person shall be held to answer for a capital, otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *"

It is manifest that the court's action is in the teeth of the 5th Amendment if applicable to the states. Our position is that the trial had in this case abridged the privilege and immunity of the defendant in that he was tried without presentment or indictment of a grand jury, simply upon the warrant of the Justice of the Peace. In so making this contention we are aware that this court in a number of cases has held that the 5th Amendment applied to the United States and not to the states. Slaughter House cases, 16 Wallace 36, 21 Law Ed. 394. Also Hurtado v. California, 110 U. S. 516, 28 Law Ed. 233; Maxwell v. Dow, 176 U. S. 581, 44 Law Ed. 597, and Twining v. New Jersey, 211 U. S. 97, 53 Law Ed. 77. Also it has been held that this court may inquire upon a review of the proceedings in a criminal case in the courts of a state as well as in the United States whether the accused had been convicted by "due process of law" within the meaning of the 5th and 14th Amendments of the Constitution. Halinger v. Davis, 146 U. S. 314.

So our contention is that the trial had in this case simply upon a warrant by the Justice of the Peace, without anything further, plus the fact that the owner of the car never appeared or testified, took away the right of the defendant to be confronted by his witnesses and therefore is in derogation of the 5th Amendment and as applied here is applicable to the State in violation of the 14th Amendment.

We further contend where one asserts a constitutional right guaranteed under the 5th and 14th amendments, and the state court decides against that right, as claimed, this court does not stop with a determination that the correct test has been applied. The sufficiency of the evidence is considered. Norris v. Alabama, 294 U. S. 587, 79 Law Ed. 1074. Toledo Newspaper Co. v. United States 247, 62 Law Ed. 1186.

Frankly speaking, we cannot see any good reason for the division of privileges and immunities guaranteed to a federal citizen and those of a state citizen. Why the separation? Prior to the Dred Scotts case, Dred Scott v. Sanford, 19 Howard 393, 15 Law Ed. 691, it was thought that a citizen of a state was also a citizen of the federal government. That was held otherwise in the above-named case.

Under the 14th Amendment federal citizenship is paramount and irrespective of the state's desire or will, an individual born or naturalized and subject to the jurisdiction thereof, is a citizen of the United States and of the state wherein he resides. Then the Constitution extends to the person the state's privileges and immunities of an American citizen. And as before stated that in the Slaughter House cases, supra, which was the genesis of the theory that there were two kinds of citizenship, state and federal, and that the privileges and immunities of one were not necessarily the privileges and immunities of the other, this court step by step has whittled down that position.

Mr. Justice Miller, speaking for the majority of the court, stated that the privileges and immunities referred to in the first eight amendments did not necessarily have any reference to the priveleges and immunities guaranteed to state citizenship. That has been whittled down by this court until we are at a loss now to know what is the difference between what are federal privileges and immunities and what are state privileges and immunities. Certain it is that the decisions of this court are practically at one to the effect that the privileges and immunities extended to

citizens in the 1st Amendment of the Constitution are privileges and immunities protected against state action as well as federal action. See Bridges v. State of California, 314 U. S. 252, 86 Law Ed. 314. Near v. Minnesota, 283 U. S. 697, 75 Law Ed. 283. Schneider et al. v. State (Town of Irvington No. 11) et al., 308 U. S. 147, 84 Law Ed. 146.

We respectfully submit the statute on its face, coupling it with the charge of the court, was in derogation of the defendant's constitutional rights. As before stated, while we are aware that this court has in a number of cases been aloof to extend the privileges and immunities arising under the 5th and 6th Amendments to state citizenship, we have no hesitancy in urging it upon the court in view of its recent trend. This court has held that a person of color denied the right to have a person of color on the panel, either on the panel of the grand jury or petit, is in violation of due process whether it is by state action or action by a judge or in the course of conduct in selecting the jury by the officials. Ex parte Virginia, 100 U. S. 339, 25 Law Ed. 677. Strauder v. W. Virginia, 100 U. S. 303, 25 Law Ed. 644. Carter v. Texas, 177 U. S. 44, Law Ed. 839.

It is also held that the states are prohibited from denying to a citizen privileges and immunities extended to him in the 1st Amendment to the Constitution.

We respectfully submit that the action of the court in this case was in derogation of the 5th Amendment and properly applied it abridged the privileges and immunities of this defendant and denied him due process in derogation of the 14th Amendment.

Respectfully submitted,

COBB, HOWARD & HAYES
By: JAMES A. COBB,
Attorney for Petitioner.

W. G. ANDERSON,
Of Counsel.